United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-4043

76-4043

UNITED STATES COURT OF APPEALS

For the Second Circuit

PITTSTON STEVEDORING CORPORATION,

Petitioner

-v-

JOHN SCAFFIDI,

Respondent,

Director, Office of Workers Compensation Programs,

United States Department of Labor

Party in Interest - Respondent

B

Pls

PETITIONERS REPLY BRIEF

Joseph F. Manes
Attorney for Petitioner
Finney Farm
Croton-on-Hudson
New York, 10520

UNITED STATES COURT OF APPEALS
JUN 2 1976
A. DANIEL FUSARO, JR.
SECRETARY

TABLE OF CASES

76-4043

UNITED STATES COURT OF APPEALS
For the Second Circuit

PITTSTON STEVEDORING CORPORATION,

Petitioner,

-V.-

JOHN SCAFFIDI,

Respondent,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR

Party in Interest,Respondent.

PETITIONERS' REPLY BRIEF

Respondent Scaffidi urges that a moot question has been presented to the Court.

The reason for such conclusion is somewhat obscure.

The syllogism hypothecated in respondents' brief does not stand scrutiny.

It suggests that once compensation insurance coverage has been provided an employer's interest, in a proceeding such as this, is at an end.

We cannot concur in such a simplistic solution.

The main issue on this appeal is whether the injury sustained by respondent and the attendant benefits are within the purview of 33 USC 901 et seq. or whether his remedy lies under the New York State Workmens Compensation Law.

It is obvious that benefits are widely disparate in the respective jurisdictions.

The Petitioner herein has contested the issue of jurisdiction and has been a party to all of the proceedings through the Administrative Law Judge level.

It was at that juncture that Petitioner and its insurance carrier parted company. The Carrier declined to contest the issue before the Benefits Review Board, although requested to do so by the Petitioner.

It seems beyond question that Petitioner has a vital interest in continuing to protest the exercise of jurisdiction by the United States Department of Labor.

That interest is obviously a monetary one since its obligation to the Insurance Carrier is substantially enhanced for premium payments.

Even a cursory inspection of 33 USC 901 et seq. compel the conclusion that the onus for payment of benefits is upon the employer. i.e.

> "Sec.4(A)" Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under Sections 7-8-9."
>
> "Sec.7(A) The employer shall furnish such medical, surgical etc."

The statute is replete with caveats and injunctions directed solely to the employer.

It is not unreasonable to conclude therefore that the

employer is an indispensable party to all proceedings under the Act.

The happenstance that he has secured compensation insurance does not relieve him of liability.

Even 33 USC 935 relied upon by respondent is couched in terms of employer's responsibility.

The regulations governing the Benefits Review Board (20 CFR 801) unquestionably envision the employer as a party to all proceedings before it.

It is noteworthy that the respondent Director O.W.C.P., in its brief before this Court did not see fit to challenge the petitioner's right of appeal.

Section 802.410 of the Rules of Practice and Procedure before the Board provides in part -" any party adversely affected or aggrieved by a decision of the Board may take on appeal to the U.S. Court of Appeals.".

Paragraph 10 of Section 801.2(A) of such rules defines a party as any person or business entity aggrieved or directly affected by the decision or order from which an appeal is taken to the Board.

It would appear therefore that the Petitioner qualifies as one adversely affected or aggrieved.

Commentators who have had occasion to consider the term aggrieved party have been unable to formulate an all embracing definition (NEW YORK CIVIL PRACTICE
WEINSTEIN-KORN-MILLER
SEC.5511.03).

Since this Petitioner would be required to pay substantial insurance premium increases to its carrier in the event of affirmance of Federal jurisdiction as opposed to the lesser premium payments for State coverage, there is no doubt that it is aggrieved.

Its entire business practice would be changed because a higher premium rate would be reflected in the prices quoted to its customers for the performance of stevedoring contracts.

In addition however since the Rules of the Benefits Review Board clearly define the employer as a party and have permitted the instant petitioner to appear before such Board as a party; and to present an appeal to such Board without objection by either respondent, the latterly raised objection by respondent Scaffidi is without substance or merit.

The New York Court of Appeals has had occasion to consider a similar situation. The instant statute is modeled substantially upon the New York law.

In JAABECK v. THEODORE A. CRANE SONS COMPANY.
238 NY 314 (1924) 144 N.E. 625

the Court specifically held that either the insurance carrier or the employer has a right of appeal.

That Court, in a case in which the reverse proposition was presented, upheld the right of an insurance carrier to

appeal where an employer failed to join in such appeal.

BELLINI V. GREAT AMERICAN IND. CO.
299 NY 403 (1949).

It would seem therefore that either or both an employer or an insurance carrier maintains a right of appeal in a Workmens' Compensation proceeding; and neither can prejudice the other by inaction.

What is even more striking however is the fact that respondent Scaffidi did not raise that issue before the Benefits Review Board.

He, however, participated in such proceedings and his argument was directed solely to the issue of jurisdiction for which effort he was , as he requested, awarded a fee.

It would seem therefore that the issue is not properly before this court since it was not raised in the proceedings below.

Reference to 33 USC 92(C) seems to preclude a determination by the Court on that issue.

An issue not raised below may not be raised for the first time on appeal.

LIBERTY STEVEDORING CO.,INC. V.
CARDILLO (DC NY).
18 F. Supp. 729.

To the same effect;

SHULER V. CITY OF SYRACUSE
336 NYS 2d. 728(1972);

BOCCIA V. CITY OF NEW YORK
24 AD 2d. 663(1965).

CONCLUSION

The issues raised in respondent Scaffidi's brief should be resolved in favor of petitioner and the matter should be determined solely on the issue of jurisdiction.

Dated: June 1, 1976

Respectfully submitted,
Joseph F. Manes
Attorney for Petitioner.